RECORD AND BRIEFS

No. 16-1454

IN THE
Supreme Court of the United States

OHIO, ET AL.,

Petitioners,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMERICAN EXPRESS IN OPPOSITION

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QUESTION PRESENTED

Payment card networks such as respondent American Express ("Amex") compete for a single unit of output—a credit card transaction processed at a merchant. For each such transaction, there must be one customer willing to use the network's card, and one merchant willing to accept it. Thus, a network must appeal to both cardholders and merchants to compete effectively for transactions. To do so, Amex provides incentives to Amex cardholders (cash or reward points), which are paid for by merchants in the form of merchant fees. Nearly a third of all credit card accepting merchants choose not to accept Amex, but merchants that do also agree to nondiscriminatory provisions ("NDPs") by which they commit not to discriminate against Amex cards by steering cardholders to another card at the point of sale. At trial, the United States, joined by Petitioners (and other States that have abandoned their claims) contended that these NDPs violated Section 1 of the Sherman Act by allowing Amex to charge higher merchant fees. Also at trial, the Government's economic expert admitted that merchant fees and cardholder benefits are linked and that a reduction in merchant fees "can harm consumers" by reducing cardholder benefits.

The question presented is whether—given the undisputed relationship between merchant fees and cardholder benefits—the Government failed to carry its burden under the rule of reason when it focused only on the effect of the NDPs on merchant fees, without accounting for their effect on cardholders, or on the volume of transactions.

CORPORATE DISCLOSURE STATEMENT

American Express Company is the parent company of American Express Travel Related Services Company, Inc., and American Express Company is a publicly held company. Berkshire Hathaway, Inc., a publicly held corporation, owns more than 10 percent of the outstanding shares of American Express Company.

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INTRODUCTION

This is a case about credit card networks, which enable a cardholder to pay a merchant for goods and services. Every payment transaction requires a cardholder that wants to buy and a merchant that wants to sell. The payment network (such as Amex) sits in the middle of these two sides and brings them together to complete a transaction using that network's card. Merchants and cardholders are especially interdependent because cardholders find it attractive to use cards accepted by more merchants, and vice-versa. The NDPs concern merchant conduct at the moment a transaction takes place at the checkout counter, when the cardholder decides to use a card that the merchant accepts. A unanimous panel of the Second Circuit therefore held that an antitrust challenge to the NDPs required proof that accounted for both cardholders and merchants.

Even the United States—the lead plaintiff below—acknowledges that the Second Circuit articulated the correct principles of antitrust law. Nonetheless, Petitioners—a handful of the states that joined the United States' challenge, but had no material role in the litigation—ask this Court to reexamine the application of those settled principles to the particular facts of the credit card industry found by the district court.

This case is an especially poor candidate for review. No member of the panel dissented. No judge expressed support for rehearing. No other appellate court has had occasion to apply the relevant antitrust principles to transactions in the credit card industry, or to any industry with similar two-sided

characteristics—let alone reached a result in conflict with the one below. As the United States urges, the petition should be denied because "additional percolation in the lower courts may assist the Court in its application of general antitrust principles to two-sided platforms and to agreements of the sort at issue here." U.S. Opp. 21.

STATEMENT

A. Background

1. Two-Sided Payment Platforms

Credit card networks exist to "facilitat[e] transactions between merchants and their cardholding consumers", operating as what economists call "two-sided platforms". Pet. App. 77a. A two-sided platform brings together "two separate yet interrelated groups of customers who ... rely on the platform to intermediate some type of interaction between them." *Id.* "[U]nlike many two-sided platforms", such as "[n]ewspapers and other advertising-based forms of media", card networks provide transaction services "simultaneously" to merchants and cardholders, who make a "joint decision" to transact. Pet. App. 77a-78a, 81a. Thus, as the district court explained, "card networks are also referred to as two-sided 'transaction markets'—the two sides of the platform are brought together to consummate a single, simultaneous transaction, and the products provided by the platform are consumed in fixed proportions by the consumer and merchant." Pet. App. 78a.

To compete effectively for transactions, a credit card network must account for both merchant and

cardholder demand. Pet. App. 69a. Importantly, the market is characterized by "network effects", meaning that "cardholders benefit from holding a card only if that card is accepted by a wide range of merchants, and merchants benefit from accepting a card only if a sufficient number of cardholders use it." Pet. App. 8a, 79a. Thus, a network must "balance the two sides of its platform" by allocating the costs of the transaction between the merchant on the one side and the cardholder on the other. Pet. App. 9a.

Amex strikes this balance by charging a merchant that chooses to accept Amex a "merchant discount fee", typically calculated as a percentage of the purchase amount. Pet. App. 83a, 86a. Amex uses the vast majority of merchant discount fee revenue to pay valuable benefits to cardholders to incentivize them to obtain and use an Amex card at that merchant rather than cards issued on other networks. Pet. App. 9a-10a, 14a-15a. These benefits, funded by the merchant discount fee, operate as a "negative" price on the cardholder side. Pet. App. 182a n.36. The sum of the cardholder benefits and the merchant fees is referred to as the "two-sided net price", because it is the total price paid by the two sides to compensate the network for completing a single transaction. Pet. App. 49a.

2. Competition in the Credit Card Industry

The credit card industry today is marked by vigorous interbrand competition, with the networks offering cardholder benefits to compete for transactions. It was not always so.

The industry has long been dominated by Visa and MasterCard, which historically were owned by consortia of member banks that issued branded cards to retail banking customers. Pet. App. 12a. Although no longer owned by their member banks, Visa and MasterCard continue to operate as "open-loop" systems involving "issuer" banks that issue Visa and MasterCard cards to consumers, and "acquirer" banks that are responsible for signing up merchants to accept Visa and MasterCard. Pet. App. 13a. By contrast, Amex operates a "closed-loop" network, meaning that it runs the network and typically has direct relationships with Amex cardholders and Amex-accepting merchants. Pet. App. 14a-15a.

Visa and MasterCard command a combined share of 68.3% of credit card transactions. Pet. App. 13a. Amex has a 26.4% share, while Discover has a 5.3% share. *Id.* Visa and MasterCard are also accepted by virtually every card-accepting merchant, but "[a]pproximately three million of the total nine million U.S. merchant locations that accept credit cards—that is, roughly one out of every three—do not accept Amex cards." Pet. App. 17a. As of 2013, there were 432.4 million Visa and MasterCard cards in circulation in the United States, as compared to only 53.1 million Amex cards. E.D.N.Y. Dkt. 447-1 ¶ 18. The vast majority of Amex cardholders also carry a Visa or MasterCard, while a relatively small number of Visa and MasterCard cardholders also carry an Amex card. Tr. 3686:6-20. Thus, "[Amex] may be fairly characterized as a discretionary card for consumers when compared to the ubiquity enjoyed by Visa and MasterCard". Pet. App. 159a.

In its early years, Amex operated as a niche platform used primarily at "travel and entertainment" merchants. Pet. App. 11a. With a limited network, Amex had difficulty competing against Visa, MasterCard and their issuing banks for transactions. *See* Pet. App. 12a. Thus, Amex set out to expand its network by investing billions of dollars into cardholder benefits to incentivize cardholders to use Amex cards over other networks' cards. *See* Pet. App. 16a, 18a. Because higher cardholder demand drives higher spending at merchants, the value Amex delivered to its cardholders, funded by merchant fees, in turn has made Amex's platform more attractive for merchants. *See* Pet. App. 39a-40a.

Recognizing the advantages of Amex's differentiated model, Visa and MasterCard initially responded in two ways. *First*, they enacted "exclusionary rules" prohibiting member banks from issuing Amex cards. Pet. App. 18a-19a. These rules were invalidated as anticompetitive horizontal agreements among the member banks in *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003), *cert. denied*, 543 U.S. 811 (2004). *Second*, rather than compete with Amex on the basis of premium rewards, Visa and MasterCard attacked Amex's model with campaigns designed to sow doubts in the minds of cardholders about whether merchants would process Amex transactions. Pet. App. 19a. The express purpose of the campaigns, as described in a contemporaneous presentation to the Visa board of directors, was to "keep Amex as a niche product" by "break[ing]" the premium "success cycle", *i.e.*, Amex's strategy of using the revenue from merchant fees to deliver value to cardholders in the form of cardholder

benefits, thereby enhancing the value of Amex's network to both sides. PX0132 at '930.

Although the Amex model delivered a superior value proposition, the campaigns targeting Amex were "remarkably effective". Pet. App. 19a. By increasing cardholder uncertainty about whether Amex cards would "be accepted and on what terms", fewer cardholders used Amex, which reduced the value to merchants of accepting Amex. Pet. App. 19a-21a.

Amex responded in part by enhancing and enforcing its NDPs, which had existed in Amex's merchant agreements in some form since the 1950s. Pet. App. 19a. The purpose of the NDPs is to encourage welcome acceptance, which means that merchants that choose to accept Amex—and thus enjoy the patronage of Amex cardholders incentivized to spend by the benefits Amex provides—commit to not undermine Amex at the point of sale. Pet. App. 21a. The NDPs govern the precise moment in time at which the two sides of the market interact to jointly consume Amex's services. Amex is not present at that critical moment, and the commitment to welcome acceptance by Amex-accepting merchants is a cornerstone of Amex's differentiated model. *Id.* It minimizes interference with the incentives created by the value Amex delivers to cardholders, builds cardholder confidence in Amex's network, and in turn makes the network more valuable for both merchants and cardholders. *Id.*

Today, with Amex's NDPs in place, the industry is highly competitive and dynamic. Amex's ability to deliver valuable benefits to Amex cardholders has

led its rivals to enhance their own cardholder offerings. Pet. App. 52a. The result has been robust competition for transaction volume, and a substantial increase in output. *Id.* Indeed, "[o]ne of the ironies of this case," as the Second Circuit pointed out, "is that the government, which usually worries about oligopolists engaging in indirect collusion leading to pricing similarities, seeks relief in this case that might drive the three cards to greater similarities", which "could even increase market concentration by reducing Amex's share to Visa's and MasterCard's benefit." Pet. App. 48a-49a n.51.

B. The Government's Case

On October 4, 2010, the United States, eventually joined by seventeen Plaintiff States (collectively, the "Government"), sued Amex, Visa and MasterCard, alleging that the anti-steering provisions in each network's merchant agreements unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Visa and MasterCard entered into consent judgments in 2011 and rescinded their anti-steering provisions, while Amex proceeded to trial.

The crux of the Government's case is that, but-for the NDPs, card networks would lower merchant fees to induce merchants to steer cardholders toward whatever network is least expensive for the merchant. The Government contended that proof of such effects on merchant fees would be sufficient to show that the NDPs harm competition, *even if*, as a result, card networks were forced to decrease cardholder benefits. *See* Pet. App. 49a. Indeed, because merchant fees fund cardholder benefits (Pet. App. 9a),

and the Government had no proof that Amex's margins (and therefore prices) were supracompetitive (Pet. App. 53a), a significant reduction in merchant fees necessarily would reduce cardholder benefits, and, by extension, the competition for cardholders that those benefits drive. The Government's expert conceded this dynamic (Tr. 4177:9-13), but the Government's merchant-centric case ignored it.

C. The District Court Decision

Following a bench trial, the district court held that the NDPs violate Section 1. The court recognized that the NDPs are vertical non-price restraints, to which the rule of reason applied. Pet. App. 105a-06a. And the court acknowledged the fundamental two-sided attributes of the industry, the joint and simultaneous demand of merchants and cardholders for transactions, and the "inextricably linked" and "intertwined" nature of both sides. Pet. App. 118a, 185a. These findings were compelled by the trial testimony of the Government's economic expert, Professor Katz, who described these attributes at length, and admitted that, because merchant fees fund cardholder benefits, a reduction in merchant fees "can harm consumers" by reducing cardholder benefits. Tr. 4177:9-13. Professor Katz also explained that "an[y] assessment of market definition, market power and competitive effects should account for the two-sided nature of the market", and that "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market." Tr. 4018:13-19, 4037:15-20.

Nonetheless, in holding for the Government, the district court focused on the impact of the NDPs on merchants alone.

First, the district court defined a relevant market comprising "network services", to the exclusion of cardholders, because including cardholders would go "too far" and "frustrate" the analysis. Pet. App. 116a-18a, 122a.

Second, reversing course on the relevance of cardholders, the district court found that Amex has market power as a result of "cardholder insistence"—meaning some portion of Amex cardholders would not shop, or would spend less, at a merchant that chose not to accept Amex. According to the court, cardholder insistence allowed Amex to increase merchant fees without fear of merchants dropping acceptance of Amex. Pet. App. 71a. The court acknowledged that insistence would disappear the moment Amex stopped paying cardholders benefits, but ruled that this fragility of *cardholder* demand was irrelevant to assessing market power over *merchants*. Pet. App. 164a-65a.

Third, the district court held that the Government had demonstrated anticompetitive effects based solely on one-sided proof. The court conceded there was no "empirical evidence that the NDPs have resulted in a higher two-sided price—*i.e.*, that the price charged across Amex's entire platform, accounting for both discount revenue and the expense of providing cardholder rewards, increased as a result of the network's anti-steering rules." Pet. App. 209a. The court nonetheless held that "[p]roof of anticompetitive harm to merchants, the primary

consumers of American Express's network services, is sufficient to discharge [the Government's] burden". Pet. App. 192a. The court also found no reliable evidence of Amex's profit margins, but concluded that Amex's merchant fees were "supracompetitive". Pet. App. 172a-73a, 207a-12a. Moreover, while recognizing that "charge volume is the most direct measure of output in this particular market" (Pet. App. 151a-52a), the court placed no weight on the fact that transaction output has surged, fueled by "ever more robust suites of rewards and other ancillary [cardholder] benefits" (Pet. App. 238a).

D. The Court of Appeals' Decision

In a unanimous panel decision, the Second Circuit reversed. The court of appeals accepted the district court's factual findings, including that the market is two-sided, that cardholder and merchant demand is joint, simultaneous and interdependent, and that the Government failed to prove harm to competition among credit card networks when considering the two-sided nature of the service they provide.[1] It agreed with the district court that the NDPs are vertical non-price restraints, and thus sub-

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[1] An *amicus* brief filed by supermarket and drugstore chains (which are suing Amex based on the NDPs) charges that the court of appeals replaced the district court's findings with "extra-record materials". Merchants Br. 4-9. In fact, the court of appeals expressly accepted and relied on the district court's findings and the undisputed evidence at trial, which support the purported "extra-record" facts to which *amici* point. *Compare* Merchants Br. 6-8, *with, e.g.*, Pet. App. 50a, 68a, 80a-81a, 125a, 128a, 157a, 160a-61a.

ject to full rule of reason review.[2] But it held that the district court erred in applying the rule of reason to the facts of the case.

First, the court of appeals held that the district court erred by excluding cardholders from the relevant market because doing so failed to take into account "commercial realities", including the joint, simultaneous and interdependent nature of cardholder and merchant demand, and feedback effects. Pet. App. 31a-40a.

Second, the court of appeals held that cardholder insistence is not a cognizable source of market power because, as the district court's findings made clear, this cardholder loyalty is not durable and Amex must constantly compete for it with cardholder benefits that other networks can and do attempt to replicate. Pet. App. 40a-48a.

Third, the court of appeals held that the district court "erroneously elevated the interests of merchants above those of cardholders" by allowing the Government to carry its burden without proving the impact of the NDPs on the "the two-sided net price

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[2] The court of appeals noted that "[b]oth the [Government] and the District Court flagged alleged distinctions between the NDPs and other vertical restraints ... in apparent attempts to recast the vertical restraints as horizontal", but explained that it had "never drawn this type of distinction between any varieties of vertical restraints". Pet. App. 30a n.42. Petitioners do not challenge that correct determination. Pet. i; *see Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730-31 n.4 (1988) ("[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement.").

accounting for the effects of the NDPs on both merchants and cardholders." Pet. App. 49a. The court concluded that, applying the correct legal standard to the record, the Government's proof failed as a matter of law to establish that the NDPs adversely affect competition among credit card networks—particularly given the lack of evidence of Amex's two-sided price or profit margins, and the undisputed evidence of increasing output and higher-quality cardholder benefits. Pet. App. 49a-53a. Accordingly, the Second Circuit reversed.

The Government sought rehearing and rehearing *en banc*, with the support of eight *amicus* briefs. The panel denied the request for rehearing. The Second Circuit denied the petition for rehearing *en banc* without requesting a response from Amex or noting any dissent.[3] Pet. App. 326a.

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[3] Many of the same *amici* filed similar briefs in support of the petition. Two briefs were submitted by individual merchants and a merchant trade group. The merchants also have challenged the NDPs in separate litigation and have said their claims are identical to the Government's. Briefs also were submitted by Southwest Airlines and Discover, both of which claim a direct financial interest in the outcome here. Two briefs come from economists and law professors who submitted very similar briefs in support of rehearing by the panel or *en banc*. Another brief comes from an interest group. A final brief, from new *amici* calling themselves "former federal antitrust officials", was submitted by attorneys who predominantly represent antitrust plaintiffs. They attribute the United States' decision not to seek certiorari to government vacancies, but the United States' opposition brief shows that the Acting Solicitor General's decision is characteristically well-considered. As

REASONS FOR DENYING THE PETITION

The Second Circuit's unanimous decision is correct, follows precedent and implicates no lower court conflict. And even if the merits of the Second Circuit's analysis were reasonably debatable among professors and lower-court litigants, this Court's review would be extremely premature. As the United States emphasizes, the implications of the Second Circuit's decision beyond the facts of this case are unclear, "percolation in the lower courts may be especially useful", and *not one appellate jurist* (save those below) has "considered the application of the Sherman Act to two-sided platforms". U.S. Opp. 19-20.

For those reasons, the United States—the lead plaintiff below—properly concedes that its own case does not warrant further review. Petitioners, by contrast, seek this Court's intervention after being passive participants from the moment they joined the case through the Second Circuit's denial of the *en banc* petition.[4] Amex knows of no instance in which the United States as a plaintiff abandoned its enforcement action and this Court nonetheless granted review at the behest of another party. To the contra-

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demonstrated below, *amici* add nothing to cure the insufficiency of the petition.

[4] Of the more than 100 depositions taken by the Government, Petitioners took the lead for none, and asked questions at only three. At trial, the United States handled every witness. Petitioners' appearance at trial was limited to a three-minute summation. On appeal, the United States was lead counsel on all briefs (merits and rehearing petition), and delivered oral argument.

ry, the Court recently denied such a petition. *See United States ex rel. Purcell v. MWI Corp.*, No. 16-361, 137 S. Ct. 625 (2017) (denying certiorari petition filed by a False Claims Act relator when the United States, the lead party below, argued the lower court's decision was erroneous but opposed review). The Court should deny the petition here.

I. The Decision Below Is Correct and Consistent with Precedent.

A. Market Definition

The Second Circuit applied well-settled market definition principles in holding that the district court erred by "excluding the market for cardholders from its relevant market definition". Pet. App. 32a.

The Second Circuit correctly concluded that the district court improperly failed to "consider the feedback effects inherent on the platform by accounting for the reduction in cardholders' demand for cards (or card transactions) that would accompany any degree of merchant attrition" in response to a price increase. Pet. App. 39a.

The court of appeals also followed settled precedent in holding that a relevant market must reflect the "commercial realities" facing consumers. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482 (1992). Applying this rule, the court of appeals correctly held that the market here must "encompass the entire multi-sided platform", including the cardholders whom the district court had excluded. Pet. App. 39a. This holding was premised on the very nature of the service that Amex and its

competitors offer—as Petitioners themselves put it, "bring[ing] *cardholder* customers together with *merchant* customers for ordinary transactions". Pet. i. The Government's own expert economist similarly testified that "[i]t is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market." Tr. 4037:15-20.

The district court's decision to define the market in terms of merchants alone failed to account for the nature of the service that Amex competes to provide, and was therefore inconsistent with the purpose of market definition—"to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output". Pet. App. 32a (quoting *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004)). And the argument that the NDPs have "thwarted" price competition fails for the same reason: it ignores the vigorous competition on the cardholder side of the market driven by cardholder benefits and services that are funded by merchant fee revenue. Given this uncontested interdependence between the two halves of the single product at issue, it is impossible to account for the nature of competition by looking at only half of the equation.

Contrary to Petitioners' claims, the Second Circuit's conclusion that the defined market in this case must include both sides is fully consistent with this Court's precedent.

First, no conflict exists with this Court's precept that a relevant market should comprise "reasonably interchangeable" products. Pet. 19 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)). As

the United States has recognized, "[t]he court of appeals articulated the correct legal standard". U.S. Opp. 11. The governing antitrust principles are undisputed, and Petitioners simply ask the Court to review the application of settled law to the unique facts of this case.

The reasonable interchangeability test is used to determine whether two or more separate products *compete with each other* in the same relevant market. Here, however, the question is not whether the two sides of a card platform compete with each other (they clearly do not) but the threshold question of whether they are each *part of the same product.* A merchant and a cardholder cannot complete a transaction unless they use the same card network. Only the combination of Amex's services to merchants and cardholders *together* competes with Visa's similar offering. Asking about a merchant's consumption in isolation is like asking about the sound of one hand clapping. This is, moreover, the unavoidable implication of the district court's findings that *transaction* volume "is the most direct measure of output in this particular market", and the proper benchmark for calculating market shares. Pet. App. 151a-52a.

Thus, the fact that a merchant cannot substitute its role (card acceptance) for the cardholder's (card usage) is of no moment. Matching left and right shoes are in a single r arket not because they are substitutes, but because it is appropriate "to combin[e] in a single market a number of different products or services where that combination reflects commercial realities". *Grinnell*, 384 U.S. at 572. Because, as Petitioners themselves explain, card networks' function is "uniting cardholders and mer-

chants" (Pet. 2), dividing cardholders from merchants for analyzing competition among card networks makes no sense.

Second, Petitioners misconstrue the Second Circuit's ruling to argue that it conflicts with *Kodak*, 504 U.S. 451. The unanimous court of appeals did not adopt a new rule requiring that separate markets be consolidated whenever the price in one affects the price in the other. Pet. 20. Rather, the ruling correctly took account of the interdependency of merchant and cardholder demand, on the particular facts as found by the district court. Pet. App. 31a-40a. *Kodak* did not concern two interdependent halves of a single product; it considered copier parts and service of those parts—two products that can be, and often are, sold separately and at different times. *See* 504 U.S. at 475-76 ("[I]t makes little sense to assume, in the absence of any evidentiary support, that equipment-purchasing decisions are based on an accurate assessment of the total cost of equipment, service, and parts over the lifetime of the machine."). For the same reason, Petitioners' analogy to vertically related markets of components and final goods (Pet. 21) is inapposite.

Third, no conflict exists with *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). As the United States has recognized, this Court "has not squarely considered questions of market definition or proof of anticompetitive effects in cases involving two-sided platforms". U.S. Opp. 19. In *Times-Picayune*, this Court simply held that the defendant lacked market power over advertising. 345 U.S. at 610-13. The Court did not examine competitive effects at all, much less decide whether the

plaintiff had to prove adverse effects across interdependent markets.

More fundamentally, Petitioners' analogy to newspapers underscores their misconception about the nature of credit card networks and the challenged restraints. A reader's decision to purchase a newspaper is not necessarily dependent on any advertiser buying advertising space because many readers buy newspapers to read the news. By contrast, a merchant and cardholder simultaneously use a single network because they want to complete a transaction together. As a result, the "products provided by the [credit card] platform are consumed in fixed proportions" by each side as part of one, simultaneous transaction. Pet. App. 78a. Moreover, because sales to readers in *Times-Picayune* were unrestrained, this Court understood the challenged restraint to "concern[] solely one of these markets"—the market for the sale of advertising to advertisers. 345 U.S. at 610. By contrast, the restraints here govern the precise moment of interaction between the two sides at the point of sale.[5]

Regardless, *Times-Picayune* at most stands for the proposition that a restraint excluding competitors from one side of a two-sided platform can be analyzed without considering the other side. The defendants there were accused of tying sales of adver-

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[5] *Berlyn Inc. v. Gazette Newspapers, Inc.*, 73 F. App'x 576 (4th Cir. 2003), an unpublished decision, is distinguishable for the same reasons. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), would be as well if it had discussed the relevant market, which it did not.

tising that "effectively excluded" other papers from doing business with advertisers. 345 U.S. at 605. The NDPs do not exclude competing networks from merchants' registers or cardholders' wallets; they affect only the joint decision of a merchant and a cardholder about which network they will use to complete a given transaction. *Times-Picayune* does not speak to the relevant market for analyzing competition for such joint transactions.

Fourth, no conflict exists with *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984), which analyzed a rule limiting the number of football games colleges could license for television broadcast. *NCAA* is not on point—neither the NCAA, which imposed the rule, nor the product at issue (intercollegiate football games) is two-sided. Rather, the case involved conventional one-sided vertical distribution—the colleges (upstream) selling rights to broadcast football games to the television networks (downstream), which broadcast those games to viewers (the end-consumer). *Id.* at 94-95. And contrary to Petitioners' suggestion, the *NCAA* dissent did not advocate for a two-sided analysis; it merely disagreed about how output should be measured (number of games televised versus number of viewers). Here, no one disputes that the proper measure of output is transaction volume, that a transaction cannot be completed without having one merchant interact with one cardholder both using the same network's services, or that output has been surging in the years since Amex reinforced its NDPs in response to Visa's and MasterCard's attacks. Pet. App. 41a, 52a.

B. Market Power

The Second Circuit correctly held that the Government failed to prove that Amex has market power. "Market power is the power to force a purchaser to do something that he would not do in a competitive market." *Kodak*, 504 U.S. at 464 (internal quotation marks omitted). Amex's lack of market power is unsurprising, given that Amex's competitors have long advertised that millions of merchants do not accept Amex.

The Second Circuit properly held that cardholder "insistence" did not give Amex market power, based on the district court's own finding that Amex must compete fiercely for cardholder loyalty, which would rapidly "dissipate" if Amex were to offer lower value to cardholders than did Amex's rivals. Pet. App. 46a. As the unanimous panel explained, "evidence showing that Amex must compete on price in order to attract consumers does not show that Amex has the power to increase prices to supracompetitive levels." *Id.*

The courts of appeals are in accord on this proposition, and Petitioners do not contend otherwise. *See, e.g.*, *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 58 (2d Cir. 1997) (explaining that established buyer preferences are not a serious entry barrier); *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 797 (1st Cir. 1988) (Breyer, J.) ("[V]irtually every seller of a branded product has *some* customers who especially prefer its product. But to permit that fact alone to show market power is to condemn [vertical restraints] that are bound to be harmless, including some that may serve some

useful social purpose."); *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, No. 90-1547, 1991 WL 149249, at *6 (3d Cir. Aug. 9, 1991) ("Nor is intense brand loyalty sufficient to presume market power."), *aff'd en banc*, 959 F.2d 468, *cert. denied*, 506 U.S. 868 (1992).

Notably, Petitioners do not challenge the Second Circuit's market power holding. U.S. Opp. 10 n.2. But market power is a necessary predicate to a firm's ability to harm competition. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., concurring in part and dissenting in part) (explaining that under the rule of reason a violation cannot exist unless "the parties have sufficient market power to make a difference"); *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) (Easterbrook, J.) ("Firms without power bear no burden of justification."). And there is no question that the theory of harm espoused here turns upon the now legally unsupportable assertion that merchants have no choice but to accept the NDPs (*see* Pet. 33), and that Amex has "forced the entire credit-card industry to channel competition away from merchant fees and into cardholder rewards" (U.S. Opp. 19).

The absence of any challenge to the court of appeals' market power holding causes Petitioners' theory of harm to fall apart. On the unchallenged record, if competition orbits around cardholder rewards, that is only because cardholders find those rewards attractive enough that some merchants, in turn, find it beneficial to accept Amex. Other merchants do not find it beneficial to accept Amex, and so they do not. Merchants are not "forced ... to do something that

[they] would not do in a competitive market." *Kodak*, 504 U.S. at 464 (citation omitted).

C. Anticompetitive Effects

The Second Circuit also applied well-settled rules for analyzing anticompetitive effects, holding that the Government "bore the initial burden to show that Amex's NDPs have 'an actual adverse effect on competition *as a whole* in the relevant market.'" Pet. App. 49a-50a (quoting *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995)).

The court of appeals explained that the Government could have met its initial burden under the rule of reason by showing "that cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)." Pet. App. 52a. Petitioners cited this same menu—reduced output, reduced quality and supracompetitive pricing—long offered by the courts of appeals. *See, e.g.*, *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001) ("[W]hether an actual adverse effect has occurred is determined by examining factors like reduced output, increased prices and decreased quality.") (cited at Gov't C.A. Br. 65); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (anticompetitive effects include "reduced output, raised prices or reduced quality") (cited at Gov't C.A. Br. 65), *cert. denied*, 547 U.S. 1092 (2006).

Applying this standard to the undisputed record, the Second Circuit correctly held that the Government had not met its burden of proving adverse effects. That record showed that "industry-wide transaction volume"—the undisputed measure of output in this market—"has substantially *increased* and card services have significantly *improved* in quality" with the NDPs in place. Pet. App. 52a. On that record, the Second Circuit correctly concluded the Government had not carried its burden. *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 237 (1993) ("Where, as here, output is expanding at the same time prices are increasing ... a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.").

Moreover, both courts below agreed that the record could not support a finding that Amex's prices were supracompetitive, when accounting for both sides. *See* Pet. App. 209a (district court's finding that the record did not provide "a reliable measure of [Amex's] two-sided price that appropriately accounts for the value or cost of the rewards paid to cardholders", or of Amex's margins); Pet. App. 53a (similar conclusion from court of appeals).

Petitioners suggest that the court of appeals contradicted precedent by "shift[ing] to the Government the burden of *disproving* any procompetitive benefits". Pet. 24. The supposed conflict is illusory. Under the rule of reason, a plaintiff always bears the burden to demonstrate competitive harm in "the product market as a whole". *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 45 (1977) (citation omit-

ted). The service that Amex competes to provide is completing payment transactions between a cardholder and a merchant—a service for which neither has any use unless the other does. Thus, Petitioners' argument that a court need not account for cardholders is an invitation to misdefine the competition at issue.[6] Petitioners rely on *United States v. Topco Associates*, 405 U.S. 596 (1972), for the proposition that restraining competition in "one sector of the economy" cannot be justified by "promot[ing] greater competition in a more important sector". Pet. 25 (quoting 405 U.S. at 610). But cardholders do not exist in a separate "sector" of the economy from merchants for purposes of transacting through card networks, whose purpose is to bring them together. *Supra* at 2-3.

Indeed, under this Court's precedent, the interdependence of merchant and cardholder demand *requires* assigning burdens as the court of appeals did. As the Government's expert testified: "[A]n assessment of market definition, market power and competitive effects should account for the two-sided nature of the market". Tr. 4018:13-19. Evidence about the NDPs' effect on merchant fees does not support a confident inference of harm to competition overall,

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[6] Despite marginalizing cardholding consumers, Petitioners and *amici* suggest the district court found two-sided adverse effects by concluding that the NDPs result in higher retail prices to consumers who do *not* use credit cards. Pet. 18. A focus on retail prices is both inconsistent with Petitioners' determination to ignore cardholders, and "erroneous, as it fails to take into account offsetting benefits to cardholders in the form of rewards and other services". Pet. App. 49a n.52.

because such effects necessarily will effect cardholders. Thus, the evidence on which Petitioners would stake their case is at least as consistent with healthy competition as anticompetitive effects. *See* Tr. 4037:15-20 (Government expert testifying: "It is critical not to draw unwarranted and misleading conclusions by focusing solely on one side of a two-sided market."); *cf. Brooke Group*, 509 U.S. at 237 (refusing to recognize anticompetitive effects where "rising prices are equally consistent with growing product demand").

Condemning a restraint on such an ambiguous showing creates an unacceptable risk of false positives that "increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage". *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894-95 (2007); *see also Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("The cost of false positives counsels against an undue expansion of [antitrust] liability."). The Second Circuit correctly refused the Government's invitation.[7]

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[7] This concern for avoiding erroneous condemnation of competition also answers Petitioners' complaint (Pet. 16) that proving a case under the rule of reason is too hard. *See, e.g.*, *Leegin*, 551 U.S. at 895 ("*Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive."); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 Antitrust L.J. 135, 155 (1984) (cited at Pet. 17) ("[T]he rule of reason's application to vertical arrangements should err on the side of tolerance" because "[m]ost vertical arrangements are procompetitive.").

II. Petitioners' Other Arguments Are Unpersuasive.

A. Petitioners' Call for "Guidance" Does Not Justify Review.

Petitioners suggest that this case is an opportunity to inject "concrete guidance" into the rule of reason analysis for vertical restraints. That proposal is unsound.

An answer to Petitioners' fact-bound question presented is unlikely to provide definitive guidance beyond this case. Indeed, the *only* way the Court could reach a legal issue of broad significance would be to set a rule for highly dynamic two-sided platforms without the benefit of judicial experience. *Infra* at 30-34 (explaining that, to the extent Petitioners urge the adoption of principles that would apply to other dynamic industries, this Court's decisional process would be greatly aided by percolation). Petitioners identify no case that would have been aided by a decision on the question presented, nor any specific question of law on which they believe concrete guidance is lacking. Indeed, the petition elsewhere contends that the framework applicable to the Government's claims is well established. Pet. 18-25. Petitioners merely disagree with the Second Circuit's application of that framework to the facts, which is no basis for review. *See* Sup. Ct. R. 10.

In cases where, as here, this Court has determined that a particular practice must be analyzed under the rule of reason, it has left the particulars of that case-specific analysis to the lower courts to apply in the varying contexts presented to them. *E.g.*,

FTC v. Actavis, Inc., 133 S. Ct. 2223, 2238 (2013) ("We therefore leave to the lower courts the structuring of the present rule-of-reason antitrust litigation."). It has not tried to take on fine-grained and fact-bound questions about what information is relevant to the analysis of a particular market. *See, e.g.*, *Leegin*, 551 U.S. at 898-99 ("As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 24 (1979) (concluding that challenged restraint "should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.").

As Petitioners' own authorities reveal, this Court has generally granted certiorari in antitrust cases to instruct courts on which mode of analysis to apply—*i.e.*, *per se*, "quick look" or rule of reason—and not to superintend the particulars of the analysis as applied to specific facts. *See, e.g.*, *Actavis*, 133 S. Ct. 2223 (addressing mode of analysis for pharmaceutical reverse payment settlement agreements); *Leegin*, 551 U.S. 877 (same for resale price maintenance); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006) (same for joint ventures); *Cal. Dental*, 526 U.S. 756 (same for advertising restrictions by a professional organization); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (same for vertical maximum price restraints); *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (same for vertical non-price restraints).

The Court has long held that the rule of reason governs a challenge to a vertical non-price restraint, and further review is unnecessary.

B. Petitioners' Arguments About Allocative Efficiency Do Not Warrant Review.

In the guise of discussing "allocative efficiency", Petitioners argue that a rule of reason plaintiff should be able to satisfy its burden by pointing to a structural effect on "the proper functioning of the price-setting mechanism of the market". Pet. 34 (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462 (1986)). But where a vertical restraint is concerned, such proof merely establishes that the restraint *restrains* competition (as all vertical restraints do), not that it *harms* competition.

No reason exists for this Court to grant review to pioneer such an approach. The Court has permitted abbreviated proof only in cases involving horizontal restraints that portend the loss of "independent competing entrepreneurs". *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 357 (1982). In fact, the only authority cited by Petitioners (Pet. 34) and their *amici* (*e.g.*, Professors Br. 10-12) for their proposed standard are cases applying quick look analysis to horizontal restraints. But "horizontal restraints are generally less defensible than vertical restraints". *Maricopa Cty.*, 457 U.S. at 348 n.18. Accordingly, this Court has "rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones." *Leegin*, 551 U.S. at 888.

Even putting aside "the appreciated differences in economic effect between vertical and horizontal agreements", *id.*, "quick look" presumptions are reserved for restraints for which "the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of [the] restriction ... follow[s] from a quick (or at least quicker) look". *Cal. Dental*, 526 U.S. at 781. Here, Petitioners point to *no* relevant judicial experience—let alone enough to justify "a confident conclusion". In fact, the United States analogizes the NDPs to most-favored-nation provisions as restraints that are vertical in nature but might have some impact on horizontal competition and appropriately notes that "there is no meaningful body of precedent addressing the antitrust status of agreements of that character". U.S. Opp. 21. To avoid condemnation of healthy competition, proper application of the rule of reason depends on an evaluation of "all the circumstances of the case". *Maricopa Cty.*, 457 U.S. at 343.

C. The Role of the Credit Card Industry in the Economy Does Not Justify Review.

Petitioners' discussion of the role and scale of the credit card industry does not justify review. Pet. 26-30. Earlier this Term, the Court declined to review a case involving this industry—a settlement between merchants, Visa and MasterCard, that the petitioners there claimed would "mark[] a sea-change in the payment industry" and "may save merchants between $26.4 and $62.8 billion in acceptance costs over the next decade". Petition, *Photos Etc. Corp. v. Home Depot, U.S.A., Inc.*, No. 16-710, 2016 WL 6994898, at *35-36, *cert. denied*, 137 S. Ct. 1374

(2017). Denial is appropriate here too. Many cases in which this Court's review is sought involve industries of *economic* significance. But the Court seeks to hear matters of recurring *legal* importance. Petitioners have not raised any question of widespread legal importance.

III. Review Would Be Premature Because No Relevant Body of Law—Let Alone a Conflict—Exists in the Courts of Appeals.

As the United States highlights, the "decision does not directly conflict with any decision of this Court or another court of appeals". U.S. Opp. 19. Indeed, the decision below is the *only* federal appellate authority analyzing a vertical restraint in a two-sided market as such, and it is unanimous. Thus, *not one appellate jurist* has endorsed anything like the arguments Petitioners advance. Petitioners do not contend otherwise.[8]

Yet lower courts will undoubtedly have the opportunity to address such restraints, and in a variety of contexts. Indeed, as *amici* concede, "[t]wo-sided platforms are increasingly common" as "modern technologies have led to rapid growth in the number,

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[8] Petitioners suggest a conflict with the Second Circuit's decision in *Visa*, 344 F.3d 229. Pet. 17. Even if such an intracircuit conflict existed, it would not warrant review. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). And the Second Circuit itself found no conflict when the Government made the same argument in its rehearing petition: *Visa* is inapposite because it involved "*horizontal* restraints" affecting "one particular *level* of competition contained within a two-sided platform". Pet. App. 36a.

size and importance of such firms". Professors Br. 22. Today, some of the most innovative firms and industries now consist of platforms that have some two-sided characteristics—including search engines, ride-sharing, e-commerce, rental exchanges and electronic payments. At the same time, "[t]he economic literature analyzing two-sided platforms is new, complex, and evolving", and has only recently "considered the impact of restraints" in two-sided markets. Economists Br. 7-8. Scholars, the government and the antitrust bar continue to study two-sided markets and their potential for competition concerns.

Petitioners' premature invitation to establish definitive antitrust principles for two-sided platforms now—if any such principles of broad application exist—portends errors that could "chill the very conduct the antitrust laws are designed to protect". *Verizon Commc'ns*, 540 U.S. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)). *Cf.* Antitrust Modernization Comm'n, *Report and Recommendations* 39 (2007) ("It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis.").

As the United States observes, "the Court ordinarily awaits the development of a conflict among the lower courts before exercising its certiorari jurisdiction." U.S. Opp. 21. With no conflict here, the Court should deny review, allow further consideration and experimentation in the lower courts, and avoid putting itself in the position of prematurely and improvidently establishing rules for the Googles

and Ubers of today and tomorrow. *See, e.g.*, *Lackey v. Texas*, 514 U.S. 1045, 1047 (1995) (Stevens, J., respecting denial of certiorari) ("Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from [other courts'] further study.").

The prudence of allowing percolation here is underscored by the variety of views among Petitioners and their *amici* on what questions this Court should address and how they should be resolved. To cite just a few examples: Whereas some *amici* contend that the court of appeals' ruling on market power "has grave antitrust implications" (RLC Br. 20), Petitioners do not address market power at all in the question presented (Pet. i). Whereas some *amici* contend that the evolving economic literature on two-sided platforms should be given little weight (Merchants Br. 16-25), others argue that courts should pay close heed to that literature (Economists Br. 7-8).[9] Whereas some *amici* argue that the ruling below "provide[s] no guidance for future cases involving two-sided platforms" such as newspapers "that may differ from ... credit card platforms" (Economists Br. 8 n.7), others contend the ruling would apply in any

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[9] In arguing against reliance by courts on economic literature and *amicus* briefs, with more than some irony, the Merchant *amici* chide Professor Willig for not disclosing in his *amicus* brief below that he previously has served as a paid expert for Amex. Those same *amici* neglect to mention that Joseph Stiglitz, their highly-paid expert in their damages case against Amex, filed an *amicus* brief below in which he failed to note his extensive current financial ties to parties whose interests are at stake in this case.

case of a two-sided platform (Professors Br. 22-23). Here, percolation would help clarify the issues that matter to the analysis, illuminate which economic principles are relevant to it and sharpen the points of disagreement for the Court to resolve.

Finally, percolation is particularly appropriate given the fact-bound nature of the rule of reason and the wide range of industries that exhibit two-sided attributes. *Amici* speculate that the Second Circuit's holding could affect theoretical challenges to unspecified conduct in these industries. *E.g.*, Professors Br. 22. But *no* other appellate court has yet analyzed the competitive attributes of two-sided platforms under the rule of reason. Indeed, as Petitioners concede, it is inherent in the rule of reason that "the result of the process in any given case may provide little certainty or guidance about the legality of a practice in another context." Pet. 16 (quoting *Maricopa Cty.*, 457 U.S. at 343). For example, the United States concedes the "idiosyncratic character" of the NDPs (U.S. Opp. 20), and it has successfully argued against the application of the decision below in other contexts. *See United States v. Charlotte-Mecklenburg Hosp. Auth.*, No. 3:16-CV-00311-RJC-DCK, 2017 WL 1206015, at *9 (W.D.N.C. Mar. 30, 2017) (declining to grant defendants judgment based on the decision below because "the Second Circuit's analysis is deeply rooted in the details and dynamics of the credit-card industry").

This Court should articulate antitrust principles with the benefit of concrete judicial experience. Different courts assessing restraints in different two-sided markets should "serve as laboratories in which the issue receives further study" before this Court

settles the question. *Lackey*, 514 U.S. at 1047 (Stevens, J., respecting denial of certiorari) (citation omitted).

IV. Recognized Defects in the Government's Proof Make this Case a Poor Vehicle.

In the long term, if the antitrust issues arising from two-sided markets prove controversial and recurring, this Court will have future opportunities to review them. But in the short term, this case presents a particularly poor vehicle because the Government's proof was insufficient to carry even the burden it proposed.

First, the district court defined a relevant market limited to the provision of "network services", *i.e.*, the service of facilitating the transaction for the merchant over the network. But this is only one component of what Amex and other credit card platforms do. They also process transactions for cardholders, provide other services such as rewards, and acquire merchants for the network. The cost of these services is covered by the merchant discount fee. Indeed, the vast majority of Amex's merchant discount fee is used to pay for cardholder services (mainly rewards), while much smaller components cover acquiring and network services.

On this score, the district court's decision is at war with itself, and the record lacks evidence that could support Petitioners' burden. In a market for processing transactions for merchants alone, the relevant "price" for purposes of analyzing competition is the fee for that service, *i.e.*, the network services component of the merchant discount fee. But that is

not the price the district court used to analyze market power and competitive effects. As the court of appeals noted, the district court looked at "the full merchant-discount rate, not simply the fees associated with 'network services'". Pet. App. 37a-38a n.45. The court defined a market for one service, but used prices for a larger bundle of services.

The court of appeals concluded that it "need not decide here whether this inconsistency constitutes error because, in any event, the District Court defined the relevant market incorrectly." *Id.* But it is irreparable error: The Government advocated a market for network services to merchants, and there is *no record evidence* of an Amex "network service price". Amex does not charge merchants separately for network services. Nor is it possible to derive the network service component of Amex's merchant fee from the record; that would, at a minimum, require subtracting the cost of rewards, of which the district court found there was no reliable evidence. Pet. App. 209. Thus, resolving the question presented regarding the relevant market in Petitioners' favor would lead to the conclusion that Petitioners adduced no proof of harm to competition in that market.

Second, even looking at the wrong price (the merchant fee), the record lacks another piece of evidence necessary to establish a price-based case of harm.

A "claim that a defendant set supracompetitive prices [established] through direct evidence" requires "an analysis of the defendant's costs," including "that the defendant had an 'abnormally high price-cost margin'". *Mylan Pharm. Inc. v. Warner Chilcott Pub.*

Ltd. Co., 838 F.3d 421, 434 (3d Cir. 2016) (quoting *Geneva Pharm.*, 386 F.3d at 500); *accord Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 666 (7th Cir. 2004) (Easterbrook, J.).

The district court found there was no reliable evidence of Amex's costs, and thus no "reliable measure of American Express's per transaction margins across its industry groups". Pet. App. 172a-73a.[10] Accordingly, whatever price is used, it would be impossible to conclude on this record that that price is supracompetitive and thus indicates that the NDPs harm competition.

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[10] The United States suggests that it proved Amex's prices are supracompetitive because when Amex increased its fees for certain merchants as part of its "value recapture" program, those increases "were not wholly offset by additional rewards expenditures or otherwise passed through to cardholders". U.S. Opp. 18 n.4; Pet. App. 209a. However, "the fact remains that 'the evidentiary record does not include a reliable measure of the two-sided price charged by American Express that correctly or appropriately accounts for the network's expenses on the cardholder side of the platform'", and "[a] finding that not every dime of merchant fees is passed along to cardholders says nothing about other expenses that Amex faces, let alone whether its profit margin is abnormally high." Pet App. 51a.

CONCLUSION

The petition for a writ of certiorari should be denied.

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